

1 Christian Gabroy
2 Nev. Bar No. 8805
3 Kaine Messer
4 Nev. Bar No. 14240
5 GABROY | MESSER
6 The District at Green Valley Ranch
7 170 South Green Valley Parkway
Suite 280
Henderson, Nevada 89012
Tel: (702) 259-7777
Fax: (702) 259-7704
christian@gabroy.com
kmesser@gabroy.com
8 Attorneys for Plaintiff Tiare Ramirez

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

10 || TIARE RAMIREZ, an individual;

vs.

WYNN LAS VEGAS, LLC; DOES I through X; and ROE Corporations XI through XX inclusive,

Defendant.

Case No.: 2:19-cv-01174-APG-EJY

**PLAINTIFF'S OBJECTION AND
RESPONSE TO DEFENDANT'S
PROPOSED JURY INSTRUCTIONS**

PLAINTIFF'S OBJECTION AND RESPONSE
TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Plaintiff Tiare Ramirez (“Plaintiff” or “Ramirez”), by and through her counsel of record, hereby provides her Objection and Response to Defendant’s Wynn Las Vegas, LLC’s (“Defendant” or “Wynn”) Proposed Supplemental Jury Instruction (ECF No. 152) and Defendant’s burden of proof regarding FMLA Interference Claims.

First, Defendant has the burden of proof to establish lawful reason to interfere with Plaintiff's FMLA. As stated in *Sanders*, the FMLA "validly shifts to the employer the burden of providing that an employee what have been dismissed regardless of the employees request for, or taking of, FMLA leave. That approach is also consistent with the Supreme Court's admontiatoin that the burden of proof should 'conform with a party's superior access to the proof.' *Sanders v. City of*

1 *Newport*, 657 F.3d 772, 780 (Ninth Cir. 2011).

2 *Sanders* stated the following:

3 **A. The FMLA**

4 Enacted in 1993, the FMLA “was the culmination of
 5 several years of negotiations in Congress to achieve
 6 a balance that reflected the needs of both employees
 7 and their employers.” *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1119 (9th Cir.2001). The
 8 declared purpose of the FMLA is:

9 (1) to balance the demands of the workplace with the
 10 needs of families, to promote the stability and
 11 economic security of families, and to promote national
 12 interests in preserving family integrity;
 13 (2) to entitle employees to take reasonable leave for
 14 medical reasons, for the birth or adoption of a child,
 15 and for the care of a child, spouse, or parent who has
 16 a serious health condition;
 17 (3) to accomplish the purposes described in
 18 paragraphs (1) and (2) in a manner that
 19 accommodates the legitimate interests of employers.

20 29 U.S.C. § 2601(b).

21 Although the FMLA created a statutory right to
 22 reinstatement after taking FMLA leave, this right is not
 23 without limits. The FMLA is clear on this point:
 24 “Nothing in this section shall be construed to entitle
 25 any restored employee to ... any right, benefit, or
 26 position of employment other than any right, benefit or
 27 position to which ***779** the employee would have been
 28 entitled had the employee not taken the leave.” 29
U.S.C. § 2614(a)(3)(B)

29 We agree with this approach. In interference
 30 claims, the employer's intent is irrelevant to a
 31 determination of liability. See *Xin Liu*, 347 F.3d at
1135; Bachelder, 259 F.3d at 1130; Edgar, 443 F.3d
at 507 (“The employer's intent is not a relevant part of
 32 the entitlement inquiry under § 2615.”); see
 33 also *Colburn v. Parker Hannifin/Nichols Portland*
Div., 429 F.3d 325, 332 (1st Cir.2005) (“[E]mployer
 34 motive plays no role in a claim for substantive denial
 35 of benefits.”); *Smith*, 298 F.3d at 960 (“If an employer
 36 interferes with the FMLA-created right to medical
 37 leave or to reinstatement following the leave, a
 38 deprivation of this right is a violation regardless of the
 39 employer's intent.”); see also *Strickland*, 239 F.3d at
1208; Hodgens, 144 F.3d at 159.

40 “An employer must be able to show, when an
 41 employee requests restoration, that the employee
 42 would not otherwise have been employed if leave had
 43 not been taken in order to deny restoration to
 44 employment.” 29 C.F.R. § 825.312(d) (emphasis
 45 added) (titled “Under what circumstances may a
 46 covered employer refuse to provide FMLA leave or
 47 reinstatement to eligible employees?”). Section

825.216(a) is to the same effect, and provides that “[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.”

As further stated in *Bushfield v. Donahoe*, Interference under § 2615(a)(1) has been interpreted broadly to not only include denial of FMLA rights, but also to encompass instances where an employer has discouraged an employee from using FMLA leave, retaliated against an employee for having exercised or attempted to exercise FMLA rights, or otherwise caused the employee to suffer an adverse employment action as a consequence of taking FMLA leave. 29 C.F.R. § 825.220(b), (c); Bachelder v. Am. West Airlines, Inc., 259 F.3d 1112, 1125 (9th Cir.2001) (to succeed on FMLA interference claim, a plaintiff must show by a preponderance of the evidence that the taking of FMLA protected leave constituted a negative factor in the decision to terminate the plaintiff's employment or to visit other adverse employment actions upon the plaintiff). The Ninth Circuit takes an expansive view of what constitutes an adverse employment action, and has interpreted such actions to include lateral transfers, unfavorable job references, changes in work schedules, or any other action that would be reasonably likely to deter employees from engaging in protected activity. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir.2000).

Next, Plaintiff objects to Wynn's proposed Supplemental Jury Instruction No. 1 re "Authentication and Clarification of Medical Certifications Under the FMI A."

PROPOSED SUPPLEMENTAL JURY INSTRUCTION No. 15

BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim or any affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence, regardless of which

1 party presented it.

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 3 Gordon, J. Standard Jury Instructions. <<https://www.nvd.uscourts.gov/wp-content/uploads/2018/01/Standard-Jury-Instructions-for-Civil-Trials-APG.pdf>>
 4
 5 (Ninth Cir. 1.6 including “claim or any affirmative defense”)

6
 7
 8 Wynn’s proposed Instruction relies on CFR § 825.307. However, this
 9 Regulation concerns authentication and clarification of an employee’s *initial*
 10 medical certification. Here, the is no dispute that the initial medical certification
 11 was granted.

12 Rather, when an employee seeks FMLA leave, the first step is to determine
 13 if the employee is eligible. See U.S. Department of Labor Field Operations
 14 Handbook Chapter 39 (“FOH”) 39d04¹; 29 CFR 825.123. At step two, the
 15 employer may request an initial medical certification to confirm the need for
 16 FMLA. See FOH 39h00(a)(1). This occurred in the matter at hand. Step three
 17 occurs after a medical certification has been granted but if the employer has
 18 doubts about the employee’s use of leave, as is the case here. At that point, the
 19 employer must provide proper notice to the employee of its suspicion but, per
 20 *Bachelder*, still cannot resort to holding an employee’s FMLA usage as a negative
 21 factor in a disciplinary decision.

22 Indeed, this matter is more analogous to *Boecken v. Gallo Glass Co.*, 412
 23 F. App’x 985 (9th Cir. 2011). There, the Ninth Circuit reversed and remanded a
 24 District Court’s summary judgment holding for an employer-defendant who
 25 terminated an employee for engaging in non-covered activities during FMLA
 26 leave. *Id.* at 987. The employee in *Boecken*, like here, had sought and received

27
 1 Available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch39.pdf>.

1 an FMLA medical certification. *Id.* However, the employer terminated the
2 employee for “misuse” of FMLA. *Id.* The Ninth Circuit reversed the ruling as the
3 employer had not provided proper notice to the employee of misuse pursuant to
4 29 C.F.R. § 825.301(b)(1). *Id.*

5 Further, to assist this Court, Plaintiff hereby provides citation to the U.S.
6 Department of Labor’s December 9, 1997 opinion letter. There, the U.S. DOL
7 explained:

8 Can an employer terminate the employment of a two-
9 year employee if the employee does not return after
fourteen weeks of leave?

10 The FMLA requires covered employers to provide
11 eligible employees with up to 12 workweeks of leave
12 in a 12-month period for any one or more of the
13 specified family or medical reasons. If the employee is
14 unable to or does not return to work at the end of 12
15 weeks of FMLA leave (provided the employer
16 designated the leave as FMLA leave and so notified
the employee in writing), all entitlements and rights
under FMLA cease at that time. The employee is no
longer entitled to any further job restoration rights
under FMLA and may be terminated.

17 An employer, however, must observe any
18 employment benefit program or plan or CBA that
19 provides greater family or medical leave rights to
employees than the rights established by the FMLA.
(See § 29 CFR 825.700.) Thus, an employer under
20 your example would have an obligation under its own
“leave of absence” policies to extend leave benefits,
21 health care benefits, and job protection for up to 14
22 weeks, but not beyond 14 weeks. You also should be
23 aware that the discrimination prohibition in FMLA
(Section 105) would prevent an employer from
24 terminating such employees who have used FMLA
leave and do not return after 14 weeks if the employer
25 does not treat similarly situated employees who have
not used FMLA leave (for example, employees on
leave to care for an ill grandparent or parent-in-law)
26 the same.

1 Also, Plaintiff utilizing other types of leave from March 24, 2017 to October
2 14, 2017 does not act as a waiver of Plaintiff's FMLA right to reinstatement. See
3 FOH 39a03; 29 CFR 825.220(d); 73 FR 67934; 73 FR 67986 -67988.

4 Further, under the ADA, when multiple types of leaves are at plan (such as
5 here), an employer must provide leave under whichever statute provides the
6 employee with greater rights and protection. See 29 CFR 825.702(a) -(b).

Finally, when an employee's employment is governed by a CBA, the CBA's provisions only apply to the extent they do not conflict with the FMLA. See FOH 39j00(d).

10 DATED this 23rd day of October 2024.

GABROY | MESSER

By: /s/ Christian Gabroy
Nev. Bar No. 8805
Kaine Messer
Nev. Bar No. 14240
The District at Green Valley Ranch
170 South Green Valley Parkway
Suite 280
Henderson, Nevada 89012
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I hereby certify that the following parties by electronic means on this 23rd day of October 2024 have been served with this **PLAINTIFF'S OBJECTION AND RESPONSE TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS:**

All parties registered through the Court's CM/ECF system.

GABROY | MESSER

By: /s/ Christian Gabroy

Christian Gabroy

Nev. Bar No. 8805

Kaine Messer

Nev. Bar No. 14240

The District at Green Valley Ranch

170 South Green Valley Parkway

Suite 280

Henderson, Nevada 89012

christian@gabroy.com

kmesser@gabroy.com

Attorneys for Plaintiff I

GABROY | MESSER
170 S. Green Valley Pkwy., Suite 280
Henderson, Nevada 89012
(702) 259-7777 FAX: (702) 259-7700